CF0000062987

(2)

Single Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR:M.P.

Criminal Appeal No. 1004 of 2000.

Appellant: Accused (In Jail)	Soloman S/o Pambhajan Jera, aged about 35 years, Village & Police Station- Raigarha, Distt. Gajpati, Orrissa.
	Vs.
Respondent:	State of M.P. Through: Police Station- Saraipali Distt. mahasamund,M.P.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

CONVICTION	SENTENCE

FR (17)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal 1004/2000.

Soloman Vs. State of M.P.

JUDGMENT

(11. 6. 2001)

The appellant being aggrieved by the judgment dated 29.2.2000 passed in Special Case No. 86/99 by the learned Special Judge (NDPS) Raipur, convicting the appellant under section 20 (b) of the N.D.P.S.Act read with section 8 of the said Act and sentencing him to undergo R.I. for two years and to pay fine of Rs. 2000/-, in default of payment of fine to further undergo RI for two months, has filed this appeal.

2. The prosecution case in brief is that on 11.9.99 Head constable B.L.Sahu (PW-3) of Police station Saraipali was on patrol for checking certain vehicles etc. At about 4.30 A.M. on 12.9.99 while seeing an on-coming bus No. C.R. 05/1765 the said head constable stopped the bus. Finding that the present appellant was sitting on the back seat and was engaged in suspicious activities, the said head constable issued him a notice under section 50 of the N. D.P.S. Act and after taking the consent of the said person (accused) took his search. In the

said search about 6 Kgs.of Ganja was recovered from the possession of the appellant. The said contraband was weighed on the spot and was thereafter seized by the said head constable. The accused so also the contraband were brought to the police station. FIR was registered at the police station. The samples were drawn and were sent for the analysis. After obtaining the positive analytical report the Police armed with such report, the seizure memo and the statements of the witnesses filed the challan. As the accused denied commission of the offence,he was put to trial. The prosecution agency in support of its case examined as many as five witnesses, and produced number of documents. After hearing the parties the trial Court was pleased to convict and sentence the appellant as referred to above.

3. Shri Ashish Shukla ,learned counsel appearing for the appellant submits that the head constable is not an empowered officer either under sections 41,42 or 43 of the N.D.P.S.Act 1985,therefore,the search and seizure effected by him are illegal and in view of the judgment of the Supreme Court in the matter of State of Punjab Vs. Balbir Singh 1994 III SCC 299 AND State of Punjab Vs.Baldev Singh 1999 VI SCC 172, the appellant deserves to be acquitted. It is submitted by him that if a particular police official is not empowered under the Act, by chance or accidentally finds some contraband, then he is not required to observe the provisions of section 50 of the N.D.P.S.Act,but the moment he finds that

there is breach of provisions of NDPS Act and he himself is not empowered then such officer should stop and should require an empowered officer to proceed further. According to him, the search was taken by the head constable and as the seizure was effected by him without any authority of law or without any authorisation under sections 41,42 and 43 of the NDPS Act, the articles seized by him can not be looked-into nor can same be used as evidence against the accused.

4. Shri Deep Kesharwani learned counsel appearing for the state on the other hand submits that in the present case PW-3 accidentally found that the accused was carrying some narcotics with him and as he himself was not empowered under sections 41,42 and 43 , necessity of compliance of section 50 of the NDPS Act does not arise and as the search was taken by him, he was entitled to seize the articles. He further submits that seizure of the articles at best may be an irregularity and unless the prejudice is shown by the accused,the said irregularity shall not affect the prosecution case or the conviction.

5. I have heard the parties at length and perused the record.

6. Before coming to the core question regarding authorisation and authority of PW-3 B.L.Sahu, it is necessary to see his statement.

7. B.L.Sahu (PW-3) in paragraph 2 of his statement has clearly stated that while checking Bus No. OR 05/ 1765 he found that a person was perplexed and was

looking suspicious. He issued him a notice under section 50 of the Act and after obtaining his consent took his search. According to him, he had seized the suitcase and as he had no instruments to seal the said suitcase,he brought the said suitcase in open condition to the Police station. He has further stated that after seizure of the articles he issued notice(Ex P-11)to the accused requiring the accused to produce his authority to possess the contraband. In paragraph 3 he states that he brought the accused and the contraband to the police station, produced them before the Station House Officer and lodged the First Information Report (Ex P-4) According to him he had recorded the statements of Ambikaprasad, Panchram, Maheshwar and Pramod Kumar. In the cross examination he had stated that he had no prior information about the transit / transportation of Ganja. He also denied the suggestion that the memorandums were prepared at the Police station. In paragraph 9 he had stated that after completing the seizure formalities at about 5.30 AM he proceeded towards the police station at 6 AM and reached there at 7 AM. He further stated that at the place of seizure he had recorded the statements of bus conducter and the cleaner.

8. From the statements of this witness it would clearly appear that he had no prior information that a particular person sitting in a particular vehicle was transporting or carrying Ganja. When an officer whether empowered or not under the provisions of sections 41,42 and 43 of the Act proceeds

with the search without knowing that such person under search is carrying contraband or not, then he is not required to issue him a notice under section 50 of the NDPS Act but the moment the empowered officer comes to know that the person under search was carrying contraband then he has to immediately follow the provisions of NDPS Act. If the officer who accidentally or by chance found the narcotics is not an empowered officer then immediately after finding the narcotics he has to inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. The question has been very lucratively considered in the case of State of Punjab Vs. Balbir Singh (supra). After considering the entire law in relation to sections 41 , 42 and 43, 50,52 and 57 of the Act their Lordships have laid-down certain guide-lines. In para 25 (1) their Lordships have directed as under :-

> " If a Police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.P.C. and when such search is completed at that stage section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. If during such search or arrest there is a chance recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with with the other provisions of the NDPS Act."

From a perusal of the said observations it would clearly appear that if a police officer without any

prior information makes a search or arrests the person in normal course of investigation into an offence or suspected offence as provided under the provisions of the Code ofCriminal Procedure , at that stage section 50 of the NDPS Act would not be attracted. Their Lordships have further observed that if during search there is a chance recovery of narcotics and psychotropic substance then the police officer who is not empowered should inform the empowered officer who shall thereafter proceed in accordance with the provisions of the NDPS Act but if the officer taking the search happens to be an empowered officer,then from that stage onwards he should carry-out the investigation in accordance with the other provisions of the NDPS Act.

9. The matter again came-up for consideration before the Supreme Court in the matter of State of Punjab Vs. Baldev Singh. After reviewing and re-considering the entire law on the said subjects their lord-ships have observed that section 50 of the Act would come into play only in the case of search of a person as distinguished from the search of any premises etc; However, if the empowered officer without any prior information as contemplated in section 42 of the Act makes a search or causes arrest of a person during the normal course of investigation into an offence or suspected offence and on completion of that search, a contraband under the NDP S Act is also recovered,the requirement of section 50 of the NDPS Act is not attracted. Their Lordships have further observed that provisions of

sections 100 and 165 of the Code of Criminal Procedure are not in-consistence with the provisions of the NDPS Act and are applicable for effecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying-on investigation including search, seizure or arrest under the provisions of Code of Criminal procedure, comes across a person being in possession of narcotic drug or the psychotropic substance then he himself would follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. According to the Supreme Court if the investigating officer is not an empowered officer then it is expected of him that he himself should inform the empowered officer under the NDPS Act, who should thereafter, proceed from the stage onwards in accordance with the provisions of the NDPS Act. Their Lordships also observed that if the mandatory provisions of the Act are not complied with then the same may not vitiate the trial but would render the recovery of illicit articles suspected and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of possession of the illicit articles recovered from his person during the search conducted in violation of the provisions of section 50 of the Act. Their Lordships Their Lordships have also observed that recovery of such illicit articles in contravention of section 50 of the Act can not be used as evidence of proof of unlawful possession of the contraband though any other material recovered during that search may be relied upon by the prosecution, in other proceedings. The Supreme

Court has also observed that a presumption under section 54 of the Act can only be raised after the prosecution had established that the accused was found to be in possession of the contraband in his search conducted in accordance with the mandate of section 50 but an illegal search can not entitle the prosecution to raise the presumption x under section 54 of the Act. Sections 41,42 and 43 of the Act clearly provide that a search and seizure can be effected by an officer who has been so authorised either by the Central Government or by the State Government. There is no notification of the Central Government authorising a head constable of Police as an empowered officer.

10. By notification No. B-6-35-V-SR-85 - 4804 dt. 11.11.85, the State Government in exercise of powers conferred by section 42 of the NDPS Act has empowered certain officers for the purpose of section 42 of the Act within their respective jurisdiction. The notification is in relation to certain officers of Excise Department,Police department, Revenue department and Drugs department. The clause relating to the Police department authorises the following persons :-

i) Superintendenr of Police / Additional Superintendent of Police.

ii) Deputy Superintendent of Police

iii) Assistant Superintendent of Police

iv) Inspector

v) Sub Inspector

vi) Assistant Sub Inspector.

From this notification it would clearly appear

that a head constable ~~is~~ has not been empowered under section 42 of the NDPS Act to conduct search or seizure.

11. Section 42 authorises the empowered officer to enter in certain enclosed premises,taking search, making seizure and arrest without warrant or further authorisation. Section 43 of the NDPS Act relates to powers of seizure and arrest in public place,which provides that any officer of any of the departments mentioned in section 42 may seize in any public place or in transit any narcotic or psychotropic substance in respect of which he has reason to believe an offence has been committed. Such officer has also been authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under chapter 4 and ~~for~~ if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful,arrest him and another person in his company.

11. In the present case undisputedly PW-3 B.L.Sahu was not authorised as an empowered officer to take search and effect seizure.So far as the question of defence of non compliance of section 50 of the NDPS Act is concerned,the same would not be available to the accused in view of the above dictum of the Supreme Court but the question still would be whether the officer who was not empowered could proceed with the seizure and investigation. If the concerned officer who accidentally or by chance comes across the narcotic drug and psychotropic substance then imme-

diately on finding the same, he has to refer the matter to an empowered officer who shall be obliged to proceed further in the matter in accordance with the provisions of the Act. In the present case, the head constable searched the person and immediately thereafter seized the articles. He proceeded further with the investigation. He did not inform the empowered officer that he himself had by chance or accidentally found that accused was holding the narcotric drug. He did not request the empowered officer to proceed further with the investigation.

12. Section 53 of the NDPS Act relates to power to invest officer of certain department with the powers of officer incharge of the police station. Section 53 of the NDPS Act reads as under :-

> 53 Power to invest officers of certain departments with powers of an officer-in-charge of a police station - (1) TheCentral government, after consultation with the State government, may, by notification published in the official gazette, invest any officer of the department of Central Excise, Narcotics, Customes, Revenue, Intelligence or Border Security Force or any class of such officers with the powers of an officer incharge of a police station for the investigation of the offence under this Act.
>
> (2) The State government may, by notification published in the official gazette, invest any officer of the department of drugs control, revenue or excise or any class of such officers with the powers of an officer-in-charge of a police station for the investigation of offences under this Act."

12. No notification of the State government has been produced before me to show that the head constable of Police department has been authorised either by the Central government or by the State government to make investigation into such offences, or such head constable

has been invested with the powers of an officer incharge of a police station. In the absence of such notification authorising or empowering a head constable, such head constable was not entitled to proceed further with the investigation. From the statement of PW-3 B.L.Sahu it would clearly appear that after finding the narcotic drug with the accused, he did not request the empowered officer to proceed further with the investigation or seizure but he himself proceeded with the seizure and investigation. The investigation itself being by a person who was not authorised, can not be held to be valid.

13. From the statement of PW-3 B.L.Sahu, it clearly appears that he acted as an investigating officer under the provisions of the Code of Criminal Procedure and not under the NDPS Act (Special Act) which did not authorise him to effect seizure or make further investigation.

14. PW-3 B.L.Sahu in paragraph of his statement had clearly stated that after the notice Ex P-10 was given ~~by~~ him, accused gave his consent and while opening the attache he informed the witness that he was having 5 kgs of Ganja. In accordance with the provisions of law it was expected of B.L.Sahu to stop then and there and request an empowered officer to proceed further. But said B.L. Sahu opened the attache and looked into the contents of the same. In view of above narration it has to be held that the search conducted by B.L.Sahu was illegal because while opening the attache the accused had informed him that he was carrying Ganja. The law says that

in such a situation the empowered officer should have been requested to proceed with search. The search conducted by said B.L.Sahu (PW-3) was certainly illegal because he had the information that the attache carried by accused contained Ganja.

15. In the F.I.R.(Ex P-4) said B.L.Sahu had stated that on inquiries the accused had informed him that he was carrying Ganja. In the report, said B.L.Sahu had further stated that he had seized the attache and Ganja ~~under~~ (Ex P-12). This seizure would again be contrary to the provisions of law.

16. PW-1 Chandra Badan Mishra, Reader to SDO (P) was examined to prove the information sent to the SDO (P) from the concerned police station. PW-2 B.S.Thakur ~~who~~ is the Station House Incharge of Police Station Saraipali. This witness has clearly admitted that the accused was produced with the seized Ganja. According to him the contraband was weighed in the police station and samples were drawn. He also stated that Ganja seized from the accused was brought to the police station in an open condition. He also admitted that there were certain over-writings in Ex P-1.

17. PW-4 Sunderlal is a witness to sample,memorandum and weighment. PW-5 Ambika Prasad is the person before whom the accused was searched and seizure was effected In para 1 of his statement he clearly stated that first the accused denied but later on informed the police that he was carrying Ganja in his attache. From the statement of this witness also it would appear that before taking ~~this~~ search the head constable received

the information that accused was carrying Ganja and but in accordance with law he did not inform the empowered officer to come and take charge of the further proceedings.

18. From the above discussion it would clearly appear that the search was illegal. The seizure was effected by the person who was not authorised under the law and the investigation was conducted by an officer who was not empowered under the law. In view of these legal violations of the provisions of law it would not be possible for the court to admit the evidence relating to search and seizure, nor the investigation can be held to be valid.

19. For the reasons aforesaid the appeal deserves to and is accordingly allowed. The conviction of the accused and award of sentence to him are set-aside. He is acquitted of all the charges. The accused who appears to be in Jail be immediately released if not required in connection with any other case.

Sd/-
R.S. Garg
Judge

Jyotishi